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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 1400.4100202	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on <u>07-26-2006</u> Signature <u>Ross D. Snyder</u> Typed or printed name <u>Ross D. Snyder, Reg. No. 37,730</u>		Application Number 09/418,647	Filed 10-15-1999
		First Named Inventor Trevor K. Bylsma, et al.	
		Art Unit 2664	Examiner Fox, Jamal A.

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

applicant/inventor.

assignee of record of the entire interest.  
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.  
(Form PTO/SB/96)

attorney or agent of record.  
Registration number \_\_\_\_\_

attorney or agent acting under 37 CFR 1.34.  
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NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required.  
Submit multiple forms if more than one signature is required, see below\*.

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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant(s): Trevor K. Bylsma, et al.

Title: METHOD AND APPARATUS FOR DATA DRIVEN NETWORK MANAGEMENT

App. No.: 09/418,647 Filed: 10-15-1999

Examiner: Fox, Jamal A. Group Art Unit: 2664

Atty. Dkt. No. 1400.4100202

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Commissioner for Patents  
PO Box 1450  
Alexandria, VA 22313-1450

**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

Dear Sir:

Claims 1-22 are pending in the present application. The Examiner has allowed claims 13, 14, 20, and 21. The Examiner has rejected claims 1, 4, 6-10, 15, 18, 19 and 22. The Examiner has objected to claims 2, 3, 5, 11, 12, 16, and 17. Applicant respectfully requests reconsideration of pending claims 1-12, 15-19, and 22. Applicant files herewith a notice of appeal. Pursuant to the "New Pre-Appeal Brief Conference Pilot Program," 1296 Off. Gaz. Pat. Office 67 (July 12, 2005) and the "Extension of the Pilot Pre-Appeal Brief Conference Program" dated 1/10/2006, Applicant submits a pre-appeal brief request for review. The review is requested for the reasons set forth below:

Applicant submits there exist clear errors in the Examiner's rejections and/or the Examiner's omissions of one or more essential elements needed for a *prima facie* rejection. Applicant submits the Examiner's "Response to Arguments" provides evidence that the Examiner has failed to consider the pending claims as required by the Manual of Patent Examining Procedure (MPEP) and prevailing case law. For anticipation under 35 U.S.C. § 102, a reference must teach every aspect of the claimed invention either explicitly or implicitly. Any feature not directly taught must be inherently present [emphasis added]. See MPEP 706.02 – distinction between 35 U.S.C. § 102 and § 103. As Applicant describes in detail below, Applicant submits there exist clear errors in the Examiner's rejections and/or the Examiner's omissions of one or more essential elements needed for a *prima facie* rejection.

In the Examiner's Response to Arguments, in apparent reference to claim 1, the Examiner states, "However one skilled in the art would recognize that identification of the type of node is a functional characteristic." Applicant notes the Examiner rejected claim 1 under 35 U.S.C. 102(a). Nonetheless, the Examiner appears to be applying a standard of what supposedly would be obvious to one skilled in the art, which Applicant submits is a different standard than would apply under 35 U.S.C. 102(a). Accordingly, Applicant submits the Examiner has not shown the cited reference to disclose the subject matter recited in claim 1. Thus, Applicant submits claim 1 is in condition for allowance.

In the Examiner's Response to Arguments, the Examiner states, "The examiner has added a reference in this Office action after applicant's rebuttal, and the newly added reference is added only as directly corresponding evidence to support the prior common knowledge finding, and it does not result in a new issue or constitute a new ground of rejection, the Office action may be made final." However, Applicant submits the newly cited references do not constitute evidence that can properly be relied upon to support a rejection of the claims of the pending application.

The Examiner cites "[http://msdn.microsoft.com/library/default.asp?url=/library/en-us/snmp/snmp/the\\_snmp\\_management\\_information\\_base\\_mib\\_.asp](http://msdn.microsoft.com/library/default.asp?url=/library/en-us/snmp/snmp/the_snmp_management_information_base_mib_.asp)." Applicant notes that reference includes a statement "Last updated: December 2005," which is more than six years after the filing date of the pending application.

The Examiner cites "<http://www.webopedia.com/TERM/M/MIB.html>." Applicant notes that reference includes a statement "Last modified: Monday, May 21, 2001," which is also well after the filing date of the pending application.

The Examiner cites "[http://tcpipguide.com/free/t\\_TCPIPMIBObjectsObjectCharacteristicsandObjectTypes.htm](http://tcpipguide.com/free/t_TCPIPMIBObjectsObjectCharacteristicsandObjectTypes.htm)." Applicant notes that reference contains the statement "Version Date: September 20, 2005," almost six years after the filing date of the pending application.

The Examiner cites "[http://tcpipguide.com/free/t\\_TCPIPMIBObjectsObjectCharacteristicsandObjectTypes-2.htm](http://tcpipguide.com/free/t_TCPIPMIBObjectsObjectCharacteristicsandObjectTypes-2.htm)." Applicant notes the reference contains the statement "Version Date: September 20, 2005," almost six years after the filing date of the pending application.

The Examiner cites "<http://www.wirelessdevnet.com/career/detail.phtml?type=2&id=3928>." Applicant notes the reference contains the statement "Posted on: 2002-02-06," several years after the filing date of the pending application.

In apparent response to Applicant's arguments regarding claim 1, as to what the Examiner "considers to teach 'a new set of indicators,'" the Examiner states in the Examiner's Response to Arguments, "However one skilled in the art would recognize that the new set of indicators are disclosed by the SNMP agent, Web server, a relational database, and a database for storing HTML pages and MIB files (col. 4 lines 44-53)." Applicant notes the Examiner rejected claim 1 under 35 U.S.C. 102(a). Nonetheless, the Examiner appears to be applying a standard of what supposedly would be obvious to one skilled in the art, which Applicant submits is a different standard than would apply under 35 U.S.C. 102(a). Accordingly, Applicant submits the Examiner has not shown the cited reference to disclose "a new set of indicators." Thus, Applicant submits claim 1 is in condition for allowance.

In apparent further response to Applicant's arguments regarding claim 1, as to the cited reference failing to disclose "utilizing the database including the new set of indicators to perform network management functions," the Examiner states, "However one skilled in the art would recognize that storing is a network management function." Again, Applicant submits the standard of what supposedly would be obvious to one skilled in the art apparently being applied by the Examiner is a different standard than would apply under 35 U.S.C. 102(a). Accordingly, Applicant submits the Examiner has not shown the cited reference to disclose "utilizing the database including the new set of indicators to perform a network management function." Thus, Applicant submits claim 1 is in condition for allowance.

Regarding claim 8, the Examiner states, "However one skilled in the art would recognize that the configuring of the site servers are the configuring of the path endpoints that are set forth in claim 8." Applicant notes the Examiner rejected claim 8 under 35 U.S.C. 102(a). Nonetheless, the Examiner appears to be applying a standard of what supposedly would be obvious to one skilled in the art," which Applicant submits is a different standard than would apply under 35 U.S.C. 102(a). Accordingly, Applicant submits the Examiner has not shown the cited reference to disclose the subject matter recited in claim 8. Thus, Applicant submits claim 8 is in condition for allowance.

In apparent reference to claim 9, The Examiner cites "[http://64.233.187.104/search?q=cache:9fJQ7buhBoEJ:www.vertel.com/cases/q\\_adapter.pdf+CMIP+TMN+wireless+&hl=en](http://64.233.187.104/search?q=cache:9fJQ7buhBoEJ:www.vertel.com/cases/q_adapter.pdf+CMIP+TMN+wireless+&hl=en)." Applicant cannot find a statement within the reference indicating when it may have been published. MPEP 2128, under "ELECTRONIC PUBLICATIONS AS PRIOR ART - Date of Availability," states, in relevant part, "If the publication does not include a publication date (or retrieval date), it cannot be relied upon as prior art under 35 U.S.C. 102(a) or (b)...." Applicant notes the Examiner has rejected claim 9 under 35 U.S.C. 102(a). Accordingly, Applicant submits the Examiner cannot properly rely upon that reference. Thus, Applicant submits claim 9 is in condition for allowance.

Regarding claim 10, the Examiner states, "However, one skilled in the art would recognize that the cited portion of the cited reference does disclose the reference feature (see cited portions and official notice references)." Applicant notes the Examiner rejected claim 10 under 35 U.S.C. 102(a). Nonetheless, the Examiner appears to be applying a standard of what supposedly would be obvious to one skilled in the art," which Applicant submits is a different standard than would apply under 35 U.S.C. 102(a). Accordingly, Applicant submits the Examiner has not shown the cited reference to disclose the subject matter recited in claim 10.

Further regarding claim 10, the Examiner states "However, any specific element cannot be disclosed because it is more than one element that comprises a set of indicators (see the SNMP agent, Web server, a relational database, and a database for storing HTML pages and MIB files (col. 4 lines 44-53))." However, Applicant can find no teaching in the cited portion of the cited reference that the cited elements comprise "a set of indicators."

Further in reference to claim 10, the Examiner states, "However, one skilled in the art would recognize that the cited portions do teach of combining the set of indicators with physical characteristics information of the node to produce the set of characteristics for the node." Again, while the Examiner has rejected claim 10 under 35 U.S.C. 102(a), the Examiner appears to be applying a standard of what supposedly would be obvious to one skilled in the art," which Applicant submits is a different standard than would apply under 35 U.S.C. 102(a). Accordingly, Applicant submits the Examiner has not shown the cited reference to disclose the subject matter recited in claim 10. For the foregoing reasons, Applicant submits claim 10 is in condition for allowance.

Regarding claim 15, the Examiner states, "However, one skilled in the art would recognize that the cited portion of the cited reference does disclose the reference feature (see cited portions and official notice references)." Applicant notes the Examiner rejected claim 15 under 35 U.S.C. 102(a). The Examiner further states, with respect to claim 15, "However, one skilled in the art would recognize that the set of indicators are disclosed by the SNMP agent, Web server, a relational database, and a database for storing HTML pages and MIB files (col. 4 lines 44-53)." The Examiner also states, apparently in regard to claim 15, "However, one skilled in the art would recognize that storing, configuring and alerting are all network management functions disclosed in col. 4 lines 44-64." Nonetheless, the Examiner appears to be applying a standard of what supposedly would be obvious to one skilled in the art," which Applicant submits is a different standard than would apply under 35 U.S.C. 102(a). Accordingly, Applicant submits the Examiner has not shown the cited reference to disclose the subject matter recited in claim 15.

Regarding claim 22, in reference to the apparent contradiction noted by Applicant, the Examiner states, "However, one skilled in the art would recognize that claim 22 depends on claim 10 therefore there is no contradiction." Applicant not only recognizes that claim 22 depends from claim 10, but also stated, "...with

respect to claim 10 from which claim 22 depends" in Applicant's previous response. Yet Applicant respectfully disagrees with the Examiner that the mere dependence of claim 22 on claim 10 somehow supposedly obviates the noted contradiction. The Examiner further states, "However one skilled in the art would recognize that these features are disclosed on the Web Pages." Applicant notes the Examiner rejected claim 22 under 35 U.S.C. 102(a). Nonetheless, the Examiner appears to be applying a standard of what supposedly would be obvious to one skilled in the art," which Applicant submits is a different standard than would apply under 35 U.S.C. 102(a). Accordingly, Applicant submits the Examiner has not shown the cited reference to disclose the subject matter recited in claim 22. Thus, Applicant submits claim 22 is in condition for allowance.

The Examiner states, "However one skilled in the art would recognize that storing is a network management function." Applicant notes the Examiner cites no evidence upon which the Examiner supposedly bases such a conclusion. Applicant notes MPEP 2144.03 states, in part, "The standard of review applied to findings of fact is the 'substantial evidence' standard under the Administrative Procedure Act (APA). See *In re Gartside*, 203 F.3d 1305, 1315, 53 USPQ2d 1769, 1775 (Fed. Cir. 2000). See also MPEP § 1216.01. In light of recent Federal Circuit decisions as discussed below and the substantial evidence standard of review now applied to USPTO Board decisions...." Applicant submits the Examiner's assertion appears to lack a basis in "substantial evidence."

The Examiner states, "In response to applicant's argument that claims 7 and 19 do not recite defining 'notions', routing tables defined by MIBs are the intended use of the cited reference, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim." Applicant respectfully disagrees. Applicant respectfully requests the Examiner provide authority upon which the Examiner bases the statement, "If the prior art structure is capable of performing the intended use, then it meets the claim."

Respectfully submitted,

07/26/2006  
Date

  
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